No. 88-639

SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,

Petitioner,

v.

KLAUS HUBERT GOERG,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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OBJECTIONS TO MOTION OF DR. BRUNO M. KUBLER FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Dennis S. Meir
Counsel of Record
Thomas C. Shelton
Laurel J. Lucey
Robert Goldstein
Mary Lillian Walker

KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043

Attorneys For Respondent
Klaus Hubert Goerg

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Respondent ("Dr. Goerg"), having earlier declined to consent to the filing of an amicus curiae brief, now objects to the Motion of Dr. Bruno M. Kubler for Leave to File a Brief Amicus Curiae and moves that it be denied for the following reasons:

1. Movant has not informed the Court of his true interest as required by Rule 36.3:

(a) Movant is the trustee in two German bankruptcy proceedings involving German corporations owned by Kaussen at the time of his death. The primary assets of those bankrupt corporations are claims against Dr. Goerg as trustee of the Kaussen Estate based entirely on transactions that took place in Germany. The validity and amount of these claims can be determined only by the application of German law, but as yet no such determination has been made. Nevertheless, Movant has participated actively in the plenary German bankruptcy proceedings relating to the Kaussen Estate, as a member of the creditors committee and otherwise.

(b) Although the German courts have held that the Kaussen Estate is to be treated as a single estate to be administered in a single, coordinated, worldwide proceeding,[1] Movant is now seeking to recover Kaussen assets independently of the German proceedings by pressing redundant claims in the United States and Canada, and by asserting that assets located in Georgia, California and Canada should be administered in three separate and uncoordinated proceedings without regard for the rights of creditors whose claims have been recognized in other jurisdictions.[2] This conduct by Movant including his

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[1]See German decisions at Appendix A, C and D to Respondent's Brief in Opposition, specifically the language of the German courts on pages 2a-3a, 17a-18a and 30a.

[2]Boldly asserting this position before courts in North America, Movant ignores the contradiction inherent in his seeking worldwide recognition of his German claims, while at the same time insisting that he should be allowed separate recoveries in each jurisdiction without regard for the rights of Kaussen creditors in Germany and elsewhere who have not filed claims in multiple jurisdictions.

filings in this Court are in direct defiance of the German decisions in the Kaussen proceedings and of paragraphs 12 and 14 of the German Bankruptcy Act.

(c) Because Kaussen assets in each of the three North American jurisdictions exceed his liabilities to creditors located in those jurisdictions, Movant as a creditor of the Kaussen Estate will obtain a much greater recovery if those proceedings are conducted independently than if those jurisdictions were to recognize the German proceeding as paramount and to require the kind of coordination called for by the German courts. Therefore, absent an ancillary proceeding under section 304, Movant will gain advantage over Kaussen's other creditors and obtain more than his share of the worldwide estate; the creditors of Kaussen's corporations represented by Movant will be preferred over his other creditors; and Movant will increase his entitlement to personal fees as a trustee whose compensation is dependent on the amounts he recovers for his estates.

2. Movant brings no new perspective to the issues presented in this case. The parties' briefs fully and adequately argue all issues properly before the Court, including the correctness of the Eleventh Circuit's decision, its relative importance, its impact on judicial administration, and its consistency with the decisions of other lower courts.

3. The brief Movant seeks to file raises arguments pertaining to issues that were neither decided by the Eleventh Circuit nor necessary to the Eleventh Circuit's decision. These issues are, therefore, not before this Court or properly argued here:

(a) Movant's central contention that the Eleventh Circuit's decision conflicts with *In re Lines*, 81 B.R. 267 (Bankr. S.D.N.Y. 1988) and *In re Gee*, 53 B.R. 891

(Bankr. S.D.N.Y. 1985) attacks a rationale not employed by or necessary to the Eleventh Circuit's decision[3] and fails to observe that both cases are excellent examples of courts using section 304 to provide ancillary assistance to foreign representatives whose insolvent estates were not qualified for relief under certain other provisions of the Bankruptcy Code. These two cases hold that despite the provisions of section 109(b) which exclude insurance companies from eligibility for plenary bankruptcy proceedings, foreign insurance companies may indeed be the subject of section 304 ancillary proceedings. Similarly, in *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982) the Court held that the foreign representative in foreign proceeding to liquidate a bank is eligible for ancillary assistance notwithstanding section 109(b) exclusion of banks from eligibility for Chapter 7 liquidation.[4] Thus, contrary to Movant's contentions, the results in the

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[3]Citing *In re Gee*, Movant argues that section 109(a) of the Bankruptcy Code, which sets forth who may be a "debtor" under Title 11, renders Dr. Goerg ineligible to be a foreign representative in this case. That argument makes sense only if a "debtor" is necessary in ancillary proceedings under section 304, and it altogether ignores the Eleventh Circuit holding, which is consistent with principles of international comity and conflicts of law, that the subject of a foreign proceeding, if qualified for relief under the relevant foreign law, need not be a debtor under U.S. law for the foreign representative to be eligible to bring an ancillary proceeding under section 304.

[4]The concerns about federalism underlying the traditional deference of United States courts to state probate proceedings involving the estates of insolvent decedents are certainly no stronger than the concerns about federalism which induced Congress to permit state laws to govern the liquidation of insurance companies and state banks. The point is that in 1978, Congress chose international comity over federalism. Section 304 is a comity statute which Congress adopted because of its concerns relating to multinational insolvencies and the needs of domiciliary jurisdictions for ancillary assistance in collecting assets in other nations.

decisions he cites are entirely consistent with the Eleventh Circuit decision in this case.

(b) Movant's arguments based on the assumption that the Georgia bankruptcy court's powers under section 304 do not extend to Kaussen assets in California are not properly before this Court, because no lower court in this or any other proceeding has yet considered the venue requirements of section 1410(a) and (b) of Title 28 of the U.S. Code in the context of a section 304 proceeding.

(c) Movant's argument that Dr. Goerg's use of assets now located in the United States for the payment of German tax claims would be improper is based wholly on facts outside the record in this case and raises another issue no lower court has yet considered in the context of a section 304 proceeding. The claims filed by the German tax authorities in the Germany bankruptcy proceedings relating to Kaussen are yet to be resolved by the German bankruptcy court, and the German tax authorities have not asserted any claims in this section 304 proceeding. Issues relating to Dr. Goerg's payment of those claims, whether from German assets or from American assets, are not ripe for consideration by any court. In any event, those issues are not before this Court and are, therefore, improperly argued by Movant.

CONCLUSION

Movant is not properly before this Court. His opposition to Dr. Goerg and the positions he asserts are contrary to German decisions to which Movant is subject and in violation of provisions of the German Bankruptcy Act. Movant has offered no new authority or perspective to any issue before the Court, but has filed a brief raising issues that were not considered below and are

not properly raised here. For any one of these reasons, the Motion for Leave to File a Brief Amicus Curiae should be denied and the accompanying brief rejected.

Respectfully submitted,

Dennis S. Meir
Counsel of Record
Thomas C. Shelton
Laurel J. Lucey
Robert Goldstein
Mary Lillian Walker

KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043

Attorneys For Respondent
Klaus Hubert Goerg,
Trustee